No. 14,550

IN THE

United States Court of Appeals

For the Ninth Circuit

WONG KAM WO and WONG KAM YIN,
Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The appellee agrees with the jurisdictional statement of the appellants (Appellants' Brief p. 1) with the observation that the complaint is found in the record at page 1.

STATUTES INVOLVED.

The appellee adds the following:

Section 100, Hawaiian Organic Act.

"That for the purposes of naturalization under the laws of the United States residence in the

Hawaiian Islands prior to the taking effect of this Act shall be deemed equivalent to residence in the United States and in the Territory of Hawaii, and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former allegiance shall not apply to persons who have resided in said islands at least five years prior to the taking effect of this Act; but all other provisions of the laws of the United States relating to naturalization shall, so far as applicable, apply to persons in the said islands."

31 Stat. 161, 8 U.S.C. 385.

Section 2, Act of March 2, 1907; 34 Stat. 1228; 8 U.S.C. Former Section 17.

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war."

Section 6, Act of March 2, 1907; 34 Stat. 1228; 8 U.S.C. Former Section 17.

"That all children born outside the limits of the United States who are citizens thereof in accord-

ance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States, and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

Section 101(c), Nationality Act of 1940, Act of October 14, 1940; 54 Stat. 1137; 8 U.S.C. §501.

"The term 'naturalization' means the conferring of nationality of a state upon a person after birth."

Section 101(a)(23), Immigration and Nationality Act, Act of June 27, 1952; 66 Stat. 163 et seq.; 8 U.S.C. §1101(a)(23).

"The term 'naturalization' means the conferring of nationality of a state upon a person after birth by any means whatsoever."

STATEMENT OF THE CASE.

Appellee agrees with appellants' statement of the case.

SUMMARY OF ARGUMENT.

The appellee contends that Section 100 (31 Stat. 161; 8 U.S.C. 385) of the Hawaiian Organic Act con-

templates and relates only to judicial naturalization. This contention is supported by the plain meaning of the statute, by guides to statutory construction, by the legislative history, and by subsequent Congressional interpretation.

ARGUMENT.

The appellee agrees with the appellants in their statement of the issue involved in this case (Appellants' Brief, pp. 4-5, first 4 paragraphs of argument). The issue involved is truly whether Wong Tin, the father of the appellants, resided in the United States prior to the birth of appellants.

The facts of this case are that Wong Tin resided in the Republic of Hawaii from birth, November 25, 1893 through September, 1897 (R. p. 2; R. pp. 49-50; R. pp. 301-302; Supp. R. pp. 1-2). From this date until 1923, he resided in China (R. p. 2; R. pp. 49-50; R. pp. 301-304; Supp. R. p. 7). Both appellants were born during this period between October 9, 1897 and 1923 (App. Brief p. 3).

Section 1993 R. S., although it has at this late date been repealed (54 Stat. 1173), governs the appellants' status. As interpreted by *Weeden v. Chin Bow,* 274 U.S. 657, the father must have resided in the United States prior to the birth of the child in order to confer citizenship.

Examining the father's places of residence prior to the birth of appellants there appear to be only two

possible places of residence: China and the Republic of Hawaii.

Discounting China as a part of the United States, we move on to the other place—the Republic of Hawaii, also a foreign country at the time of the father's birth and residence therein. Going no further and examining Section 1993 R. S. as interpreted by *Weeden v. Chin Bow, supra,* the proposition that this amounts to residence in the United States becomes preposterous.

Therefore, to bring this fact situation within Section 1993 R. S. some other statute must apply. As ably set forth in appellants' brief their contention is that Section 100 of the Hawaiian Organic Act applies. We think not. Section 100 is also another repealed statute (54 Stat. 1172).

Therefore, neither section under consideration herein is a living or growing statute. As a matter of fact when the Matter of L.G.J. and C. I. P., 3 I&N, Dec. 206, was decided (April 2, 1948), these sections had been repealed for almost eight years and the Board of Immigration Appeals was merely interpreting the dead hand of the law. This matter will be specifically treated elsewhere in this brief. The theory of the appellants' case is patterned after the theory of the administrative decision referred to. It is quite simple.

Appellants state that Section 1993 is a naturalization statute, citing *U. S. v. Wong Kim Ark,* 169 U.S. 649, 672, 702 (1898). Secondly, they state that Section 100 of the Hawaiian Organic Act provides: for the

purpose of naturalization under the laws of the United States that residence in the Hawaiian Islands shall be considered residence in the United States. This is the key and the crux to the case and it is here that appellee believes that appellants' contention is erroneous.

U. S. v. Wong Kim Ark, supra, was decided after a comprehensive review of the common law background of the Constitution and the 14th Amendment thereof. It held that the racial extraction of a person (i.e. Chinese) has no bearing on whether he or she acquires U. S. citizenship at birth under the Constitution of the United States. All that is necessary is that a person be born within the United States and be subject to the jurisdiction thereof. By way of dicta naturalization statutes were discussed and it was concluded that Section 1993 R. S. was enacted under Congress' power to prescribe a uniform rule of naturalization, p. 703. The Court finally concluded at p. 704:

> "The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' "

However, this Court held that Section 1993 R. S. applied to all persons regardless of race (*Quon Hing Sun v. White* (9th Cir. 1918), 254 F. 402, 404).

More pertinent at this time is the meaning of the word "naturalization". First of all what is the ordinary meaning of "naturalization"?

(1) A dictionary definition.

"That act or process of naturalizing, or state of being naturalized."

Naturalize.

"To confer the rights or privileges of a native subject or citizen on; to make as if native, to adopt (as an alien) into a state and place in the condition of a native subject or citizen."

Webster's New International Dictionary of the English Language, 1942 Ed.

(2) A legal dictionary definition.

"The act by which an alien is made a citizen of the United States of America. The act of adopting a foreigner and cloaking him with all the privileges of a native born citizen."

Bouvier's Law Dictionary.

(3) Act of October 14, 1940, §101(c), (54 Stat. 1132 et seq.).

"The term 'naturalization' means the conferring of nationality of a state upon a person after birth."

(4) 8 U.S.C. §1101(a)(23).

"The term 'naturalization' means the conferring of nationality of a state upon a person after birth, by any means whatsoever."

Assuming as we must that Section 1993 R. S. is a statute enacted under Congress' power to prescribe a

uniform rule of naturalization, an examination of the words of Section 100 itself become appropriate. At the outset, the only word which needs interpretation is "naturalization". The word is used twice in the section and it should be given its usual, natural, plain, ordinary, and commonly understood meaning. (*Crane v. C.I.R.,* 331 U.S. 1; *Addison v. Holly Hill Fruit Products,* 332 U.S. 607; *Helvering v. Hutchings,* 312 U.S. 393.) The plain meaning of the words of a statute have great weight. (*Browder v. U. S.,* 312 U.S. 335.) The natural and commonly understood meaning should be given to words used in a statute unless it is clear from the statute, the words within a statute, or from the circumstances that a different meaning was intended. *Bracy v. Laray,* 138 F. (2d) 8; *Gorin v. U. S.,* 111 F. (2d) 712. What then is the ordinary meaning of naturalization? It is that procedure whereby an alien becomes a citizen. It is a process which requires an original foreign nationality and a subsequent change. Do the context or the words of this statute lead to a different result? We think not. The second half of the section—omitted by the appellants in their brief—demonstrates clearly the meaning ascribed to the word.

> "* * * and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former allegiance shall not apply to persons who have resided in said islands at least five years prior to the taking effect of this act; but *all other provisions of the laws of the United States relating to naturalization* shall as far as applicable apply to persons in the said Islands." (Italics supplied.)

What could be more clear from the words of the statute than that Congress contemplated judicial naturalization only? The two exceptions contained in the statute apply to judicial naturalization and give meaning to the whole section.

The appellee contends further that the following guides to statutory construction are applicable.

Noscitur a sociis applies in that the phrases "naturalization under the laws of the United States" and "provisions of the laws of the United States relating to naturalization" are colored and given meaning by the specific references to "declaration of intention" and "renunciation of former allegiance". These refer to judicial naturalization. *International Rice Milling Co. v. N.L.R.B.* (5th Cir.), 153 F. (2d) 21, reversed on other grounds, 341 U.S. 665; *Ex Parte Marquez,* 3 Cal. (2d) 625, 45 P. (2d) 342.

Ejusdem generis applies also where the generalized term follows specific classes. The generalized term is given the meaning of the specific classes and is restricted to similar subject matter. Here the general term provisions of law relating to naturalization is colored by the specific references to Declarations of Intention and renunciation of former allegiance. (*Cain v. Bololby,* 114 F. (2d) 519; *In re Bush Terminal Co.,* 93 F. (2d) 659.)

However, no matter how compelling or clear words of a statute may be (the appellee contends this statute is clear), there certainly is no rule of law forbidding the examination of the legislative history of the statute. *Harrison v. Northern Trust Co.,* 317 U.S.

476. Indeed the rule now is that examination of the legislative history is mandatory. *Employees v. Westinghouse Corp.,* 348 U.S. 437, 444 (1954).

It is the contention of the appellee that the statute is so plain that the meaning of the words in dispute when read in context is inescapable. Congress contemplated judicial naturalization and nothing more. Any further stretching of the statute is unwarranted.

The legislative history also leaves no doubt but that Congress intended Section 100 to apply to judicial naturalization.

The first observation to be made is that the section under consideration remained unchanged from beginning to end of the legislative process. (Sec. 104, Proposed bill in Hawaiian Commission Report—Sen. Doc. 16, 55th Cong. 3rd Session, Dec. 6, 1898; Sec. 102 in S. 222, 56th Congress; Sec. 101 in H. R. 2972, 56th Congress; Sec. 100 S. 222 as passed by House; Sec. 100 S. 222 as reported by Conf. Comm.; and finally Sec. 100 of the Act as approved.) The debates on the floor of both houses reflect that this section was not discussed.

Two Committee reports are available; both are House Reports (House Report 549, 56th Congress, March 7, 1900, on S. 222; and House Report 305, 56th Congress, February 12, 1900, to accompany H. R. 2972.) These reports do not specifically analyze this section. As a matter of fact, House Report 549 provides only that all, after the enacting clause of S. 222, be stricken and the House Bill, H. R. 2972, be substituted.

House Report 305 is a comprehensive report on the House version of the bill. It does not specifically discuss Sec. 100 (Sec. 101 of H. R. 2972).

But, at pp. 8-9, a discussion on the meaning of citizenship reflects very clearly what Congress had in mind in using the word "naturalized". It is apparent that the Congressmen were thinking in terms of acquisition of citizenship after birth. We quote:

"Citizenship

> The persons who were citizens of the Republic of Hawaii on August 12, 1898, are defined in Article 17 of the Constitution of Hawaii.
>
> Art. 17. All persons born or naturalized in the Hawaiian Islands and subject to the jurisdiction of the Republic are citizens thereof.
>
> This includes all who were subjects under the monarchy and all who became citizens of the Republic.
>
> About 700 Chinese have been *naturalized* and several hundred foreigners of other nations.
>
> The 700 *naturalized* Chinese include all who have been *naturalized* during the past 50 years. Many of them have since returned to China and many have died; the number remaining is a matter of conjecture, but would compromise only a portion of the whole number.
>
> No foreigners have been *naturalized* since July, 1894, as under the Constitution of the Republic adopted July 4, 1894, only those could become *naturalized* who were 'citizens or subjects of a country having express treaty stipulations with

> the Republic of Hawaii concerning *naturalization'*. (Constitution, Article 18). And none of the Hawaiian treaties contained such a provision. Accordingly, the citizenship of the new Territory will be made up of native Hawaiians, and Americans, and Europeans in Hawaii, together with about 700 *naturalized* Chinese . . ." (Emphasis added.)

The quoted discussion, the wording "that for the purposes of naturalization" and the specific wording referring to renunciation of former allegiance and Declaration of Intention (Sec. 100), all clearly indicate that Congress was contemplating judicial naturalization and nothing more.

Probably the Act of March 2, 1907 (34 Stat. 1228) most clearly demonstrates the difference Congress had in mind between "naturalization" and "acquisition of citizenship" under Sec. 1993.

> Sec. 2. " . . . When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war."

> Sec. 6. "That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States, and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

There is a world of difference between a citizen who has lost his citizenship and one who would not be entitled to receive the protection of this government. In Sec. 2 and Sec. 6 above, we have as clearly as it can be stated, Congressional differentiation between a "naturalized" citizen and a Sec. 1993 citizen.

The later Congressional pronouncements, Sec. 101(c), Act of October 14, 1940 (54 Stat. 1137) and present Sec. 1101(a)(23), Title 8 U.S.C. leave no doubt that Congress has intended all along that naturalization means acquisition of citizenship after birth. This, although not binding upon the Court, serves as a guide to the meaning of the word "naturalization".

The privilege of citizenship has been held to be within the exclusive power of Congress to confer or withhold. The Court must strictly construe acts granting such privileges. *U. S. v. Dang Mew Wan,* (9th Cir. 1937), 88 F. (2d) 88.

ADMINISTRATIVE INTERPRETATION.

The statutes here under consideration have been interpreted administratively to mean that residence in the Republic of Hawaii is residence in the United States for the purposes of Sec. 1993 R. S. The appellee contends that this interpretation is clearly erroneous. It runs counter to the plain unequivocal words of the statute, counter to the legislative history of the statute, and counter to subsequent Congressional interpretation.

As has been noted by appellants once an administrative precedent decision is published, it is binding on all officers and employees of the Immigration Service. (App. Brief p. 10.) To decide a case counter to such administrative decision, would be a violation of regulations. Unless unusual circumstances were present, there is little or no opportunity for judicial review. Certainly the alleged citizen would not appeal a favorable decision nor would the matter ever reach the Board of Immigration Appeals again without a blatant violation of regulations.

The facts of the administrative case cited above are important. They show a parallel to this case, and also point up the hardship present in that case, which could have led to the erroneous decision of that case. We quote from the decision, pp. 206, 207:

> ". . . S—'s citizenship depends, in turn, on the citizenship status of his father, C—K—C—. C— was born in Hawaii in October 1893 and his parents took him to China in 1897. He married there and S—was born in China in October 1912. In

March 1913 C— was admitted to Hawaii as a citizen of the United States. Later in the same year he was admitted at San Francisco as a citizen, and he has resided here ever since. C— acquired United States citizenship by virtue of section 4 of the act of April 30, 1900, which conferred United States citizenship on citizens of the Republic of Hawaii.

"S— arrived at San Francisco in 1925 and he sought admission as a citizen of the United States. A Board of Special Inquiry excluded him on the ground that the evidence did not establish his relationship to C—. On review, however, the Department ordered that he be admitted as a citizen. The immigration authorities also recognized S—'s claim to United States citizenship in February 1931, when they issued him a citizen's return certificate on his departure to China. He returned from China in March 1933. Thus on three occasions the immigration authorities have found that S— was a citizen of this country. S— served honorably in the United States Army between November 1942 and December 1945. Had a question arisen concerning his citizenship status during this period, he could have been naturalized pursuant to section 701 of the Nationality Act of 1940, as amended, which has now expired."

It can readily be seen then that S—, the person whose status is parallel to the appellants here, had on three occasions been conceded citizenship by the Immigration and Naturalization Service. In addition, he had served honorably in the United States Army during World War II. Although these equities as a matter of law should not have influenced the Board of Im-

migration Appeals, they apparently did to the extent of causing them to twist the plain meaning of the language contained in both statutes.

One last observation ought to be made concerning the administrative decision. When the case was decided both statutes had been repealed for a period of almost eight years. These statutes were not reenacted. New sections were substituted which had much more stringent requirements than that contained in the repealed sections. It has been held by this Court that it is within the exclusive power of Congress to confer the privilege of citizenship, and the Court must strictly construe acts granting such privileges. *U. S. v. Dang Mew Wan* (9th Cir. 1937), 88 F. (2d) 88.

In the following cases the statutes construed were living-growing statutes: *North American Utility Securities Corp. v. Posen* (2 Cir. 1949), 176 F. (2d) 194; *Ada County v. Oregon Short Line R. Co.,* (9th Cir. 1938), 97 F.(2d) 666, 671; *Bowles v. Mannie & Co.,* (7th Cir. 1946), 155 F.(2d) 129, 133; *Acheson v. Yee King Gee,* (9th Cir. 1950), 184 F.(2d) 383, 384; *U. S. v. Moskowitz,* (5th Cir. 1948), 170 F.(2d) 870; *N.L.R.B. v. Medo Photo Supply Corp.,* (2nd) Cir. 1943), 135 F.(2d) 279; *Queensboro Farms Products v. Wickard,* (2nd Cir. 1943), 137 F.(2d) 969.

The above cases have been analyzed on the basis of whether the statute is living because of the basis for the rule enunciated therein. Where a statute is "living", in existence and presently applicable, then if the legislature does not approve of the executive's

interpretation, the statute may be changed and clarified by the legislature. A failure to amend by the legislature shows an acquiescence in the administrative interpretation.

That situation does not exist here. These are repealed statutes we are dealing with. They were repealed when the Board of Immigration Appeals passed on them. Furthermore, Congress disapproved of the loose construction of Section 1993 R. S., as shown by their enactment of progressively more stringent requirements. (Act of May 24, 1934, Sec. 1, 48 Stat. 797, 8 U.S.C. 6; Act of October 14, 1940, Sec. 201, 54 Stat. 1138-1139, 8 U.S.C. 601; Act of June 27, 1952, Sec. 301, 66 Stat. 235, 8 U.S.C. 1401.) Consequently, not only does the reason for the rule no longer exist but in addition Congress had demonstrated its displeasure with this section by amending it frequently.

CONCLUSION.

It is submitted that the decision of the District Court is sound. Residence in the Republic of Hawaii does not amount to residence in the United States for the purposes of Section 1993 R. S. Section 100 of the Hawaiian Organic Act applies to and contemplates judicial naturalization only. Consequently, the father does not have residence in the United States with which to confer citizenship upon appellants.

Wherefore, the appellee prays that judgment of the District Court be affirmed.

Dated, Honolulu, T. H.,
April 9, 1956.

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